87-2040

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MISSOURI, et al.,
Petitioners,

vs.

ROCKWOOD SCHOOL DISTRICT, et al.,

and

RITENOUR SCHOOL DISTRICT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Under *Ex parte Young*, what Eleventh Amendment constraints limit a federal court's authority?

A. May a federal court order a state to reimburse a political subdivision for all or any percentage of the subdivision's cost of compliance with an injunction, in the absence of a substantive remedial obligation imposed upon a state official?

B. May a federal court order a state official to perform some action beyond his authority and competence under state law, when there are local officials who possess the authority to perform the substantive actions required by the court's order?

2. Assuming a federal court may order a state to reimburse, either partially or totally, a political subdivision for costs of compliance with an injunction, may a federal court, consistently with the Eleventh Amendment, order a state to make a monetary award to a political subdivision of the state (1) which is retroactive; (2) which exceeds the subdivision's actual costs of implementing the remedial decrees of the court or (3) when the services being provided by the subdivision exceed constitutional minimum standards?

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties to the proceedings below were the petitioner State of Missouri, and its officials, The Honorable John Ashcroft, Governor of the State of Missouri, The Honorable William L. Webster, the Attorney General of Missouri, The Honorable Wendell Bailey, the Treasurer of Missouri, Dr. Robert Bartman, the Missouri State Commissioner of Education, John Pelzer, the Missouri Commissioner of Administration, and the Missouri State Board of Education: Roseann Bently, Dan L. Blackwell, Terry A. Bond, Thomas R. Davis, Susan D. Finke, Raymond F. McCallister, Jr., Cynthia B. Thompson and Roger L. Tolliver.

Parties below and respondents before this Court are the Ritenour School District, the Rockwood School District. Amicus below was the Parkway School District.

Plaintiffs in the underlying litigation are:

1. Craton Liddell, a minor, by Minnie Liddell, his mother and next friend, and Minnie Liddell; Joanna Goldsby, a minor, by Barbara Goldsby, her mother and next friend, and Barbara Goldsby; Deborah Yarber, a minor, by Samuel Yarber, her father and next friend, and Samuel Yarber; Natalie Moore, a minor, by Louise Moore, her mother and next friend, and Louise Moore; Rochelle LeGrand, a minor, by Lois LeGrand, her mother and next friend, and Lois LeGrand; on behalf of themselves and all other school age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri.

2. Earline Caldwell, Liddie Caldwell, Denise Daniels, Dwayne Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Robert Smith, Eddie S. Willis, and the National Association for the Advancement of Colored People,

Co-defendant is Board of Education of the City of St. Louis.

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The opinion of the court of appeals is reported at 838 F.2d 308. The opinion is reprinted as Appendix B in the separate appendix to this petition. The opinions of the District Court are unreported but are reprinted as Appendices C, D and E of the separate appendix.

JURISDICTION

The State of Missouri, and certain of its agencies and officials, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1343 (3) and (4).

The opinion of the court of appeals was entered on February 4, 1988. Rehearing and rehearing en banc were denied on March 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The relevant Constitutional provision involved in this case is the Eleventh Amendment which provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

STATEMENT OF THE CASE

This case arises out of the context of desegregation litigation, but it is not a case about desegregation. The issues raised in this petition have nothing to do with whether desegregation shall occur in St. Louis, or how it will occur. The issues to be resolved here involve

the extent of federal court jurisdiction and power over state and local finances and the parameters of the Eleventh Amendment. We are here concerned about the constitutional limits on the lower federal courts to restructure the internal relations of a state and its political subdivisions.

This case involves an order, requiring the State of Missouri to pay the costs of constructing schools, adding rooms or reopening closed schools incurred by two school districts of St. Louis County, allegedly necessitated by the transfer of students from the City of St. Louis to suburban districts pursuant to a plan to remedy a past constitutional violation. Although this case orders reimbursement to only two school districts, there are five other pending requests totalling $31 million, and still more are likely.

This case has had a long history, touched upon only lightly in the Court of Appeals opinion. See *Liddell v. Board of Education of the City of St. Louis*, 839 F.2d 400 (8th Cir. 1988). A brief review is necessary in order to understand the order at issue in this petition.

In 1972 a group of plaintiffs filed this action on behalf of black students in the St. Louis schools charging that the Board of Education of the City of St. Louis (the "City Board") had "effected and perpetuated racial segregation and discrimination" in its schools. Neither the State of Missouri nor any State officials were originally named as defendants. In 1977, the State of Missouri, the Missouri State Board of Education, and the State Commissioner of Education were made parties defendant. See *Liddell v. Board of Education of the City of St. Louis*, 469 F.Supp. 1304, 1312 (E.D.Mo. 1979). The case was tried to the Court in 1977. The district court denied

plaintiffs any relief, specifically finding that the State of Missouri had "effectively removed all barriers at the State level to the desegregation of the schools." *Liddell*, 469 F.Supp. at 1314.

The Eighth Circuit Court of Appeals, sitting *en banc*, reversed. *Adams v. United States*, 620 F.2d 1277 (8th Cir. 1980). After reviewing the evidence, the Court of Appeals found that not only had the City Board's 1954 desegregation plan intentionally maintained segregated schools, but that the City Board had engaged in independent segregative acts after 1956. *Id.* at 1286-1291. The case was remanded to the district for further proceedings. On remand other State officials (the Governor, Attorney General, Treasurer and Commissioner of Administration) were added as defendants. The district court found that the State defendants had "abdicated their affirmative remedial duty." *Liddell v. Board of Education of the City of St. Louis, Missouri*, 491 F.Supp. 351, 359 (E.D.Mo. 1980). The district court approved a desegregation plan calling for student reassignments, magnet schools and remedial programs in the remaining predominantly black schools. The costs of this plan were divided equally between the City Board and the State of Missouri. *Id.* at 356-357. The district court has, ever since, simply ordered the Treasurer and the Commissioner of Administration to issue checks, payable by the State, to the City Board to cover whatever it determines the State's share of costs to be.

At this same time, the City Board, apparently realizing that extraordinary State funding would be available to it under a desegregation remedy, filed a new complaint, as did the plaintiff groups, against the State and certain of the independent suburban school districts in St. Louis County. Although these complaints were filed under

the existing case number, the interdistrict claims were severed and the district court scheduled hearings to determine whether any interdistrict violation had occurred. The hearings were never held and no determination of an interdistrict violation was ever adjudicated. The suburban school boards, plaintiffs and St. Louis City Board entered into a settlement agreement which by its terms was intended to settle the litigation regarding "plaintiffs' interdistrict claims." See Appendix G, A137. The State of Missouri was *not* a signatory to this agreement and the agreement was contingent upon the district court ordering the State of Missouri to pay those expenses the signatories had agreed (without the State's consent) that the State should reimburse. The Eighth Circuit affirmed the district court's order approving the settlement plan with certain exceptions. See *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir. 1984), Appendix F. The provisions of this settlement agreement call for the State to fund 100% of the cost of voluntary interdistrict transfers from city schools to suburban districts. This includes transportation as well as reimbursement of the suburban districts' alleged costs of accepting transfer students, based upon their average per pupil cost, rather than their incremental costs caused by the transfer students. The State is also required to pay the City Board one-half of the State aid which would be attributable to the transfer students, even though the City Board no longer educates them. In addition the State is required to pay a share of the cost of teacher exchanges, student recruitment, quality education programs, and the subject of this petition, "one-time extraordinary costs, such as the costs of reopening a closed school."[1] This

1. The total cost to the State for the last fiscal year was approximately $79.6 million and for the current fiscal year it is estimated to be $102 million.

provision has been interpreted by both the District Court and Court of Appeals as requiring the State not only to fund the costs of reopening closed schools in the suburban districts, but to pay the costs of substantial new construction.

The Ritenour School District ("Ritenour") and the Rockwood School District ("Rockwood") are two of the signatories to the settlement agreement, and two political subdivisions of the State of Missouri. Ritenour requested reimbursement from the State for some of the costs of reopening a closed elementary school, claiming that it needed additional classroom space due to its acceptance of transfer students from the St. Louis school district.

The Eighth Circuit approved Ritenour's request and held the State liable for a percentage of the costs of reopening the closed school. The State's share was to be determined by dividing the total number of elementary transfers (273) by the enrollment of the building (500). The total cost of the project $587,000, included amounts already expended by the district prior to making its request.

Rockwood school district sought cash reimbursment from the State for the construction of additional classrooms allegedly needed to house transfer students. The district court denied that request for reasons not relevant to this petition. The Eighth Circuit reversed this part of the district court order and held that county districts could request reimbursement for costs that were non-recurring in nature an unlimited number of times.

The ultimate effect of the order which is the subject of this petition is that the State will be required to reimburse 100% of the money expended by the county districts allegedly needed to enable them to house transfer students from the City. The City Board, whose students are being housed, will not be required to fund any part

of the cost of these capital expenditures. Additionally, the county districts will be able to determine how much space they need because under the Eighth Circuit's decision, they are apparently free to set their pupil/teacher ratios, a major determinant of the amount of space a district has available to house interdistrict transfer students, at whatever level they choose. Thus a district could set its pupil-teacher ratio below the level required by the Court for the St. Louis school district, where the constitutional violation occurred and determine its space needs and the funding obligation of the taxpayers at large of the State, on that basis. The Eighth Circuit has thus imposed very few limits on the amounts of money a political subdivision might receive as reimbursement from the State in order to meet self-imposed obligations.

No interdistrict constitutional desegregation violation for the St. Louis metropolitan area has ever been adjudicated. The State of Missouri was not a party to the agreement whereby suburban school districts agreed to participate in a voluntary remedy on the condition that the State would bear all costs of compliance. In effect, the Eighth Circuit, in this specific case, ruled in favor of two political subdivisions upon monetary claims against the State.

REASONS FOR GRANTING THE PETITION

A. The Opinion of the Court of Appeals Below, Imposing a Financial Liability Upon the State of Missouri, Without at the Same Time Imposing Appropriate Injunctive Relief Against Named State Officials, Violates the Eleventh Amendment to the United States Constitution, and Is in Conflict With an Opinion of the Court of Appeals for the Sixth Circuit.

The instant case and a recent decision of the Sixth Circuit Court of Appeals present dramatically conflicting

views of a state's immunity under the Eleventh Amendment to the United States Constitution. On the one hand, the United States Court of Appeals for the Eighth Circuit has repeatedly upheld the consistent practice of the District Court for the Eastern District of Missouri to order the State of Missouri to pay money to local school districts to implement a desegregation remedy without any substantive injunctive relief being entered regarding the conduct of any state-level official. The most recent of these decisions is *Liddell v. Board of Education of the City of St. Louis, Missouri*, 839 F.2d 400 (8th Cir. 1988). The substantive injunctive relief ordered by the District Court is imposed only upon the St. Louis School District and its officials.

The particular aspect of the remedy which was the subject of the Eighth Circuit's most recent opinion was the construction or re-opening of classroom space in school districts accepting transfer students from the St. Louis City district. The construction or re-opening of these classrooms would actually be done by or under the supervision of the districts and their officials. The state's only responsibility would be to pay 100% of those capital costs determined to be necessary for desegregation purposes.[2]

On the other hand, the United States Court of Appeals for the Sixth Circuit has held that such a naked order to pay, in the absence of any injunctive relief against a state official, is violative of the Eleventh Amendment

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2. Other aspects of the desegregation remedy follow a similar pattern. The educational components, such as magnet schools or remedial programs, are developed and provided by the St. Louis City School District. The State's only responsibility is to fund that percentage of the costs ordered by the court. The educational programs in those St. Louis County districts accepting transfers are likewise under the control of those districts. The State's only responsibility is to pay those districts pursuant to the Court's orders.

because the monetary liability so imposed is not a mere ancillary effect of any substantive obligations imposed by a federal court. *Kelley v. Metropolitan County Board of Education of Nashville*, 836 F.2d 986 (6th Cir. 1987). Petitioners believe that the Sixth Circuit's approach is correct and is fully consistent with this Court's prior decisions on the Eleventh Amendment which hold that the amendment forbids suits seeking to impose "a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

This case arises out of the desegregation suit involving the City of St. Louis, Missouri. The named state-level defendants include (in their official capacity) the Governor, the Attorney General, the Treasurer, the Commissioner of Administration, the Commissioner of Education, and members of the State Board of Education. The consistent policy of the District Court, with the approval of the Court of Appeals, has been to order certain programs to be implemented by the St. Louis School District and its officials to remedy the continuing of effects of past de jure segregation, approve a budget for such programs and order the State to pay to the relevant school district a certain share of the budgeted costs (ranging from 50% to 100%). At no time have any of the aforesaid state-level officials been enjoined to do anything except to pay money. Yearly budgetary orders directed exclusively to the Treasurer and the Commissioner of Administration order them to take the necessary steps to issue checks in the name of the State of Missouri. Similarly, districts in St. Louis County accept transfer students from the City and the State is merely ordered to pay the alleged costs thereof.

Although the recent opinion of the Eighth Circuit, as well as the recent decision of the Sixth Circuit, arise in desegregation cases, the issue is one of Eleventh Amend-

ment principles and is by no means limited to such cases.[3] The heart of the issue presented herein is whether the Eleventh Amendment to the United States Constitution allows a federal court to bypass or circumvent a state's organizational structure in formulating relief and, in the process, impose direct monetary liability upon a state. An example may best illustrate the question presented.

It goes virtually without saying that under *Ex parte Young*, 209 U.S. 123 (1908), a federal court may enjoin a state official to conform his conduct to federal law. Thus, a federal court could clearly order state correctional officials to reduce the population in a state penal institution which the court has determined to be overcrowded to such an extent that it is in violation of the Eighth Amendment to the United States Constitution. Compliance with such an order may or may not entail additional costs to the state. The state might build a new prison or it might simply grant prisoners an early release. But even if the state chose the former course of action, the monetary costs associated with new prison construction would not render the order violative of the Eleventh Amendment. Such a cost would merely be an ancillary effect of the state official's compliance with the substantive obligation to reduce the prison population to meet Eighth Amendment standards.

If, however, the overcrowding is in a county jail, and under the laws of the state, county jails are within

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3. For purposes of this petition, we assume that the substantive relief ordered (transfers of students, quality education programs, and magnet schools) are all remedial within the meaning of *Milliken v. Bradley*, 433 U.S. 267 (1977), i.e., that they are necessary to prospectively provide equal education services to all students of the school district, and not merely to achieve a level of education services deemed appropriate by a federal court, however much the comparative costs of the "remedial" programs in this case and *Milliken* belies that assumption.

the province of county government, is it permissible to order the state to pay money to the county in order to correct the situation? Assuming no state-level officer has the *duty* to maintain or operate county jails, there could be no substantive injunctive relief against a state official which would correct the situation. Any court imposed duty of the state to pay money to the county, therefore, is *not* a necessary consequence of any duty of the state official to conform *his* conduct to federal requirements. See *Libby v. Marshall*, 653 F.Supp. 359 (D.Mass. 1986) where just such relief was ordered.

Contrast that situation to one in which state officials were ordered to transfer convicted felons from the county jail to a state facility within thirty days of conviction, in order to relieve overcrowding at the jail. *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984). Although the court's conclusion that such an order was not inconsistent with this Court's opinion in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984)[4] is questionable, the order at least directed the state officials to take some action which was within their authority and competence under state law, rather than merely ordering them to pay money to correct a situation under local control. The petitioners submit that such a solely monetary award violates the Eleventh Amendment and that is the question presented herein.

Although there has been some confusion in the lower courts, it is clear from this Court's opinions that the dividing line of permissible relief under the Eleventh Amendment is not solely between damages and equitable relief. "The Eleventh Amendment by its terms clearly

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4. The duty to incarcerate convicted felons arose under state law.

applies to a suit seeking an injunction, a remedy available only from equity." *Cory v. White,* 457 U.S. 85, 91 (1982). "This jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst State School and Hospital v. Halderman, supra,* at 100. Both prospective and retrospective relief implicate Eleventh Amendment concerns. *Green v. Mansour,* 474 U.S. 64 (1985). Thus, while the Eleventh Amendment clearly bars suits against states seeking money damages, those are not the only suits so barred. *Cory v. White, supra,* at 90, n.2. Thus, merely labeling relief as prospective as did the Eighth Circuit Court of Appeals below, does not constitute an adequate analysis of Eleventh Amendment concerns in suits when a state is the real party in interest.[5]

However, an important exception has been recognized to this general principle. In *Ex parte Young, supra,* at 159-160 this Court held that a suit challenging the constitutionality of a state official's "individual conduct" is not one against the state and, therefore, is not prohibited by the Eleventh Amendment.

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5. There can be no doubt that the State is "the real, substantial party in interest." *Ford Motor Co. v. Dept. of Treasury,* 323 U.S. 459, 465 (1945). Despite the fact that the orders are directed to the Treasurer and the Commissioner of Administration, they result in the payment of millions of dollars from the State Treasury.

The State is also a non-consenting party for Eleventh Amendment purposes. Although the myriad opinions below are replete with references to the "settlement agreement" or the "settlement plan," the State was not a signatory to any settlement. In 1983, the two plaintiff groups, the St. Louis School Board and the school districts of St. Louis County entered into an agreement settling the then pending claims for interdistrict relief. The State was not a party to that agreement and the consent of the suburban districts to participate by accepting transfer students from St. Louis City was contingent

(Continued on following page)

Thus, courts indulge in the fiction that even though a state official's actions may be expressly authorized by state law, if that authorization is unconstitutional, then the action is simply not that of the state. This presents the "well-recognized irony" that there is state action for Fourteenth Amendment purposes, but not for Eleventh Amendment purposes. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982). Petitioners submit, however, that this exception is necessarily narrow and limited to that which is necessary to vindicate the "supreme authority of the United States." *Ex parte Young, supra* at 160. The state official may be ordered, either affirmatively or negatively, to conform his conduct to federal standards. Fiscal consequences arising from such an order do not invalidate the injunctive relief under the Eleventh Amendment. This is fully explained in this Court's opinion in *Edelman v. Jordan, supra*, at 667:

> The injunction issued in *Ex parte Young* was not totally without effect on the state's revenues, since

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Footnote continued—

upon the court ordering the State to reimburse them at the rates specified in the agreement. This the District Court did. The funding order against the State was affirmed in part, and reversed in part, by the Eighth Circuit Court of Appeals. *Liddell v. State of Missouri*, 731 F.2d 1294 (1984). The Court struck down those parts of the order requiring funding of purely interdistrict relief because there had been no finding of an interdistrict violation, nor consent on the part of the State. The State funding for transfer of students between the city and the county districts was upheld on the theory that such transfers were remedying the intradistrict violation within the City of St. Louis, for which the State and the St. Louis City School Board had been found jointly liable. *Id.* at 1309. Thus, while this agreement may have settled the interdistrict claims as between the plaintiffs, the St. Louis City School Board and suburban districts, it settled nothing vis a vis the State. The State of Missouri, therefore, remains a nonconsenting party for purposes of the Eleventh Amendment analysis.

> the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits aid to welfare recipients without prior hearing. *But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms, were prospective in nature.* State officials, in order to shape their official conduct to the mandate of the court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. *Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra.* [Emphasis supplied.]

But the fiscal consequences in these cases were not, as far as the state officials were concerned, the sole or even the primary relief. Indeed, it is arguable whether the fiscal consequences were even a *necessary* aspect of the relief granted. Thus, although the state in *Young* could not collect a certain tax, it could impose a new tax or increase rates of other taxes to offset the loss of income.

Similarly, although the state may not discriminate in providing welfare benefits, the state remains free not to provide welfare at all or to adjust benefits levels for all classes of recipients. Whether a state pursues such alternatives in order to avoid increased expenditures would be its own decision. This demonstrates, however, that the fiscal consequences, if they exist, are not necessary to insure compliance with federal law, they are mere ancillary effects.

In contrast, the role of the Missouri officials (actually only the Treasurer and Commissioner of Administration) is solely to monetarily compensate local school districts for their participation in either a court ordered remedy or a voluntary interdistrict remedy. The obligation of the State of Missouri to pay is not ancillary to any other duty imposed upon any state official by the courts. "The effect on the state treasury of the order entered by the district court in the case at bar is not 'ancillary' to anything at all . . . the order to pay is ancillary only to itself, . . ." *Kelley v. Metropolitan County Bd. of Education of Nashville, supra*, at 992. The lack of substantive injunctive relief at the state level, the Sixth Circuit Court of Appeals concluded, distinguishes such an order from that upheld in *Milliken v. Bradley, supra*. The Sixth Circuit noted that in its prior opinion in *Milliken*, it had specifically pointed out that the district court in that case had directed the Detroit Board of Education and the State of Michigan to jointly initiate certain programs. *Milliken v. Bradley*, 540 F.2d 229, 240 (6th Cir. 1976). This same aspect of the order was noted by this Court in *Milliken v. Bradley, supra* at 276-277. *Young, Edelman*, and *Milliken* can be reconciled only by concluding that a federal court order having a fiscal impact upon the state treasury is permissible only when a substantive obligation has been

imposed upon a state official which requires him to conform his conduct to federal law. Even when such an appropriate injunction is entered against a state official, petitioners submit that the Eleventh Amendment does not permit as part thereof, a direct order to the state official to pay any particular sum of money. Under *Edelman v. Jordan*, *supra*, it would appear that the payment of money is simply a consequence of the official's performance of the substantive obligations imposed and not a part of the relief itself.

The requirement of substantive, injunctive relief as a necessary prerequisite to any permissible fiscal consequences is not simply a technicality under the Eleventh Amendment. In other words, the petitioners believe that the Eleventh Amendment concerns could not be remedied by the courts below simply ordering the Governer or the Commissioner of Education to construct new schools for the school districts of St. Louis County. Such construction is simply not within their authority and competence under state law and petitioners submit that an important, although often unstated, aspect of the Eleventh Amendment is a respect for and adherence to a state's method of organizing and delegating its sovereign power. As this Court stated in *Ex parte Ayers*, 123 U.S. 443, 505-506 (1887):

> It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to

> and controlled by the mandates of judicial tribunals, without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment, requires that it should be interpreted, not literally and too narrowly, but fairly and with such breadth and largeness as effectually to accomplish the substance of its purpose.
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> * * *
>
> But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation of the state, are guilty of personal trespasses and wrongs, nor to forbid suits against officials in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest.

Thus, it is apparent that a basic protection afforded by the Eleventh Amendment is a state's ability to administer its own "public affairs" and that the exception for unconstitutional conduct of a state official is limited to arresting or directing the official action of the state officer. An important aspect of this Court's opinion in *Ex parte Young* was whether the Attorney General of Minnesota had some official connection with the enforcement of the tax statute at issue. This Court concluded that:

> . . . it is plain that such officer must have some connection with the enforcement of the act or else

> it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

Id. at 157. In the course of the Court's analysis in *Young*, this Court referred to the opinion of *Fitts v. McGhee*, 172 U.S. 516 (1899), in which this Court had stated:

> In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons.

Id. at 530.

Since an *Ex parte Young* type suit against a state official is limited to controlling (by arresting or directing)

the official's conduct, petitioners submit that the Eleventh Amendment proscribes a federal court attempting to ignore or circumvent state law as it relates to that official's duties or responsibilities. To do so would create another curious "irony". This Court has traditionally held that suits against an official are permitted not only when it is alleged the official is acting unconstitutionally but when he is acting *ultra vires*, i.e., "conduct undertaken without any authority whatever." *Florida Dept. of State v. Treasure Salvors, Inc.*, *supra* at 697. Although the continued vitality of the *ultra vires* doctrine has been questioned it has not been specifically overruled. See, *Pennhurst State School and Hospital v. Halderman*, *supra* at p. 114, n.25. It would be ironic indeed if acting without authority under state law rendered an official subject to suit without violating the Eleventh Amendment, and yet at the same time, a federal court could order that same official to undertake a similarly unauthorized action.

It should be noted that this is not an instance in which there is not an official, agency or subdivision which could be ordered to perform the substantive remedial actions. Direct educational services, to the extent they are an appropriate remedy, have long been delegated by the State of Missouri to local school districts. Overriding that delegation would run afoul of the Eleventh Amendment. As stated by the Sixth Circuit Court of Appeals in *Kelley v. Metropolitan County Bd. of Education of Nashville*, *supra* at 994:

> Although the state may still have an affirmative obligation to see that the lingering effects of de jure segregation are eliminated, the existence of such an obligation does not compel either the conclusion that

> the state must discharge the obligation directly or the conclusion that the state may assign to its subdivisions no more than 40% of the cost of discharging it. "Municipal corporations [and metropolitan school boards] are political subdivisions of the state," after all, "created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them." *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907). In *Brown II*, 349 U.S. 294 (1955), the supreme court "held that the primary responsibility for abolishing the system of segregated schools would rest with the local school authorities." *United States v. Montgomery County Bd. of Education*, 395 U.S. 225, 226 (1969). If the State of Tennessee has chosen to let local school boards pull the laboring oar in attempting to eliminate the consequences of segregation, that is no more an evasion of state responsibility than if the state had chosen to act solely through the State Department of Education.

It was these basic premises which led the Sixth Circuit to reach a decision in conflict with the Eighth Circuit. The Sixth Circuit concluded that a federal court order which effectively held that no more than a certain percentage of the costs of implementing a desegregation remedy could be locally financed was a violation of the Eleventh Amendment. Such a federal court order would require that the duty to eliminate any constitutional violation be discharged through taxes levied at the state level rather than through taxes levied by the political subdivision. *Id.* at 998. When the decision to impose a tax burden at the state level had not been made by the elected representatives of the State as a whole, a

judicially imposed apportionment of this nature exceeds the authority of the federal courts in the view of the Sixth Circuit. The Eighth Circuit, on the other hand, held it has the authority to judicially impose such an apportionment in the order from which review is being sought. This dispute over federal judicial authority extends beyond school districts and desegregation. It applies to any political subdivision and any geographically localized constitutional violation.

This Court has historically avoided disputes between states and political subdivisions. "[A] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933). This principle dates back to *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). As explained in *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923), this Court in *Dartmouth College* held that:

> . . . the United States Constitution does not concern itself with matters of internal disagreements between a state and subdivisions created by it or between subdivisions created by the same state, for this area involves matters which the State is uniquely competent to resolve.

The district court and Eighth Circuit, however, have intruded in this basic area of state/local relations and in the process assumed a legislative role "for which the Court lacks both authority and competence," *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 31 (1973) and deprived "the people of control of schools

through their elected representatives." *Milliken v. Bradley*, 418 U.S. 717, 743-44 (1974).

The soundness of this Court's policy is demonstrated in the instant case. When a political subdivision sues its creator state in an attempt to require the taxpayers at large of a state to pay money to that political subdivision, one group of citizens of a state is pitted against another. The political processes of the state are implicated in the most fundamental sense. This is not an appropriate conflict for a federal court to resolve.[6]

As noted above, there was a direct remedial order entered against the state of Michigan in *Milliken v. Bradley, supra*. It seems to have been assumed (certainly there was no discussion of the point) that this was a permissible order to be directed to state level officials. The instant petition presents two questions. First, was the substantive relief imposed upon the State of Michigan in *Milliken* a necessary prerequisite to the imposition of a fiscal obligation upon the State. Second, may a federal court order a state official to perform some action which he is not authorized to do under state law, when there exist, under state law, officials who may perform such actions. These are significant questions of Eleventh Amendment law and already a divergence of approaches has developed between the Sixth Circuit and the Eighth Circuit. Petitioners request, therefore, that this Court grant its writ of certiorari in order to decide these questions.

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6. This case is not analogous to those rare circumstances where a subdivision is allowed to sue a state over some state action preventing the subdivision from complying with federal law. *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). The State of Missouri has never been found to have barred or impeded any school district from complying with any desegregation obligation. Cf. *Milliken v. Bradley, supra*.

B. The Opinion Below Is Contrary to Controlling Decisions of This Court Interpreting the Eleventh Amendment to the United States Constitution in That It Requires a State to Pay Funds to Remedy a Past Constitutional Violation Without a Finding That the State Will Be Required to Pay Only the Actual Cost of that Corrective Measure.

Assuming that it is permissible to impose upon a State a financial liability designed to reimburse political subdivisions for the costs of their compliance with substantive remedial decrees, are there any Eleventh Amendment limitations upon the imposition of such monetary liability? The petitioners submit, not only that there are Eleventh Amendment limitations on such relief, but that those limitations have been exceeded by the courts below. First, consistent with this Court's opinion in *Edelman*, a reimbursement order against a state may not be retroactive. Second, as outlined in Part A, the exception permitted by *Ex parte Young* is narrow and designed only to allow a federal court to require a state official to conform his conduct to federal law. To the extent that direct financial responsibility may be placed upon the State it must likewise be narrowly limited to only that amount which is necessary to conform to federal requirements. To the extent that a political subdivision receives more than its actual costs of compliance, it has made a profit, and the excess cost paid by the State was completely unnecessary to achieve compliance. Even if the reimbursement is limited to actual costs, to the extent that a State is reimbursing a political subdivision for providing a service which exceeds constitutional minimums, the Eleventh Amendment is violated because the State is indirectly being required to provide a service beyond that which the court could order directly.

In the opinion from which review is sought, the Eighth Circuit (1) allowed a retroactive reimbursement by the State for previous repairs made by a suburban district; (2) required State reimbursement without any factual determination that other monetary awards previously paid by the State to the county districts are not sufficient to cover costs for the proposed capital projects; (3) permitted a district to obtain a capital asset with a useful life which will be in excess of the time the asset will be required as a component of the remedy; and (4) allowed the need for additional school space in county school districts to be determined based upon a district's pupil to teacher rate for its own schools even though that rate calls for fewer pupils per teacher than the State's AAA standards, which the Eighth Circuit has held to be the standard applicable to the integrated schools in the City of St. Louis where the adjudicated constitutional violation occurred.

Turning first to the question of retroactive reimbursement, Ritenour expended $47,000 for roof repair on a school which they only proposed to be reopened for desegregation purposes after the roof repair was completed. The State submitted to the Eighth Circuit that granting Ritenour's request for reimbursement of expenses already incurred prior to its submission to the District Court constituted the type of retroactive compensation which is barred by the Eleventh Amendment to the United States Constitution. *Edelman v. Jordan*, *supra*. The Eighth Circuit's opinion rejected that argument apparently believing that any monetary relief against the State if labelled remedial, was allowable. *Liddell*, 839 F.2d at 400.

The State submits that simply noting that the instant case is in the remedial stage is not dispositive of the Eleventh Amendment issue. Many Eleventh Amendment issues arise in the remedial phase of litigation, as did *Edelman v. Jordan*. In *Edelman*, the Seventh Circuit ordered not only that the State make proper welfare payments in the future, but also that it prospectively make payments of the amounts it had previously wrongfully withheld. This Court reversed and held that such relief was barred by the Eleventh Amendment because whatever label was applied to it, the relief was indistinguishable from an award of damages since the State was not under any court-imposed obligations to pay those welfare benefits prior to the time the District Court entered its order. Similarly, in the *Liddell* case, the State is under no general obligation to pay for any capital expenses incurred by a suburban school district. This Court has regularly rebuffed efforts to convert prohibited "retroactive relief" into "prospective relief" for purposes of evading the Eleventh Amendment. In addition to *Edelman*, this Court has refused to approve, on Eleventh Amendment grounds, an order requiring notice of administrative remedies for lost benefits, *Green v. Mansour*, 474 U.S. 64, 73 (1985), and an order requiring future restoration of income from depleted trust assets. *Papasan v. Allain*, 106 S.Ct. 2932 (1986). The retroactive reimbursement approved by the Eighth Circuit is a similar circumvention of the Eleventh Amendment.

In addition, the Eleventh Amendment is also violated because these financial awards from the State to the suburban districts result in an overpayment of their actual costs. It does not matter that the settlement agreement

may provide for State reimbursement in these particular amounts. Not being a signatory to the agreement, the State is not bound by that document, but rather is bound by Court orders. No matter what the settlement agreement itself provides, any funding orders obligating the State are subject to the limitations of the Eleventh Amendment. A federal court cannot allow non-state parties to impose an obligation on the State which the federal court could not impose directly. To allow this would constitute another prohibited "end run" around the Eleventh Amendment.

Apart from reimbursement for capital projects the State has also been ordered to reimburse the county school districts for their alleged expenses in accepting transfer students. This "reimbursement" is calculated on the basis of a district's overall per pupil cost. Because this per pupil cost includes a district's fixed costs (those payable regardless of the enrollment) the State has long argued that the reimbursement formula grants a district more than the incremental costs necessitated by its acceptance of transfers. The State thus subsidizes a portion of a district's normal operation. The Eighth Circuit has affirmed that reimbursement formula without ever finding, as a factual matter, whether or not it exceeded the districts' actual costs for transfer students. Such a denial of due process would never have been countenanced if an individual were being required to pay damages.

When the requests for capital reimbursement were before the Court of Appeals, the State again raised its complaint about the reimbursement formula, arguing that any overpayments under the formula should be applied

to any State liability for capital projects. The State asked that the matter be remanded to the district court for purposes of holding an evidentiary hearing on the question. The request was ignored. The State does not believe that the Eighth Circuit or the District Court can continue to blindly follow the reimbursement formula without determining whether an overpayment exists. If there is an overpayment then not only is the formula itself constitutionally invalid but if that overpayment is allowed to stand, the orders of both the district court and the Eighth Circuit imposing a monetary liability on the State for capital costs are completely unnecessary to prospectively comply with a remedial decree. Such an award would be worse than a damage award, already disapproved by this Court, and would be indistinguishable from an award of punitive damages against a State, which this Court has never permitted.

Another aspect of the capital requests from these suburban districts which runs afoul of the Eleventh Amendment arises from the fact that the State is being asked, and will be asked in the future, to expend funds on capital assets for suburban districts which will have a useful life far longer than the period of time for which these assets will be needed as a component of the desegregation remedy. To the extent it can still be used as a school, a district may choose to do so without having to pass a bond issue on its own. If, on the other hand, it is no longer necessary to use the facility as a school, the school district may sell the asset and realize some financial benefit therefrom. Whatever scenario ensues, however, it is clear that the school district receives a financial windfall *at the expense of the State*. The State

believes that an apportionment principle, when purchasing long term capital assets for a political subdivision, is compelled by the Eleventh Amendment.

Another aspect of the problem relates not to the length of time a facility will be needed for remedial purposes, but to how much of the facility is needed for those purposes. The Eleventh Amendment is again violated to the extent the State is required to pay for a share of a capital asset which is greater than that necessary for remedial purposes. This scenario appears in the claim made by Ritenour school district for the reopening of Buder Elementary School, which was closed by the district several years ago. The Court of Appeals approved State reimbursement of a percentage of the cost of reopening, the percentage being the district's total number of elementary transfers divided by the capacity of the school. Although Buder has 22 elementary classrooms, with a capacity of 550, its reopening results in a net increase of only 9 classrooms for the district as a whole, because the district proposes to rededicate presently existing and available classroom space (representing capacity) to specialty uses such as computer rooms and gifted programs, which do not add to the capacity of a facility. Given the district's apparent desire to rededicate existing classroom space for its own educational reasons, and given the fact that Ritenour receives only approximately 273 elementary transfer students, it seems apparent that the district would have either wished to or needed to re-open Buder even if it had not accepted any transfer students at all. This would render the reopening unnecessary for the remedy and the State's share of the cost of reopening Buder should have been

zero. In any event, however, basing the State's liability on the total capacity rather than on the net increase in capacity requires the State to subsidize a portion of the district's general education program. This is not a necessary cost of prospective compliance with the transfer aspect of the remedy and runs afoul of the Eleventh Amendment.

A final matter constituting an overpayment in violation of the Eleventh Amendment, arises from the manner of calculating whether or not there is actually a need for additional space because of the influx of transfer students. In this regard, the State pointed out that both Ritenour and Rockwood School Districts have pupil-teacher ratios well below the State's AAA standards of 30 to 1. The Eighth Circuit has ruled that as a part of the remedy the State AAA standard for pupil-teacher ratios is the benchmark to be met in the integrated schools in the City of St. Louis. *Liddell v. Board of Education of the City of St. Louis*, 823 F.2d 1252, 1253 (8th Cir. 1987). A lower pupil-teacher ratio is not constitutionally required, even in the St. Louis City school district where the adjudicated violation took place. Now, however, the State is being directed to expend funds to assist suburban districts in maintaining pupil-teacher ratios well below those which the Court has held is constitutionally required. If the suburban districts accepted transfers until their pupil-teacher ratios were at the 30 to 1 level, they could accept thousands more students without the necessity for any additional space being constructed or reopened. In Rockwood alone, which has 239 elementary classrooms, increasing the pupil-teacher ratio at that level by only 2 pupils could result

in space for 478 additional elementary transfer students. This would still leave Rockwood below the State's elementary AAA standard of 30:1.

It is not suggested that a school district is without local discretion to maintain a low pupil-teacher ratio, but the taxpayers of the State as a whole should not be required to fund that decision. The construction of additional classroom space which is necessitated, if at all, only by the suburban districts' desire to maintain a lower pupil-teacher ratio, is not a cost of any *necessary* prospective compliance with any constitutional command. To the extent that the panel's opinion allows and approves State liability for such costs, it is in excess of the Court's authority under the Eleventh Amendment.[7]

As the examples above indicate, the opinion of the Eighth Circuit in this case is contrary to controlling decisions of this Court which forbid a federal court from requiring a state to pay more than the actual costs of any prospective remedy for a constitutional violation. This departure from previous Supreme Court precedent on a fundamental constitutional issue warrants this Court's review. Petitioners respectfully request this Court to grant its writ of certiorari.

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7. Obviously, the amount of money spent by the State to reimburse relatively wealthy county districts takes away from the amount the State can provide to its many other school districts, many of which are in effect being penalized because they reached constitutional standards immediately after *Brown I* or shortly thereafter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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